STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

CITIZENS UTILITY BOARD	)	
	)	
Complaint requesting the ICC	)	
to order Peoples Energy Services	)	Docket No. 03-0592
to cease and desist misleading	)	
marketing of gas offering	)	

PETITION FOR REHEARING

Pursuant to 83 Ill. Adm. Code Sec. 200.880, Peoples Energy Services Corporation ("PE Services") hereby submits its Petition for Rehearing of the Illinois Commerce Commission's ("Commission") July 21, 2004 Order in Docket 03-0592 and in furtherance thereof requests that the Commission:

(1) reconsider if Section 19-115(f) lacks an objective standard so that it is impermissibly vague and unconstitutional and cannot be enforced or applied as it was in this case;

(2) reconsider, in this case of first impression, if the Commission consistently and accurately applied the standard it articulated under the Alternative Gas Supplier Law, 220 ILCS §5/19-101 *et seq.* ("AGS Act"); and

(3) consider if the Commission improperly issued an advisory opinion as to the legality of the *force majeure* provision.

BACKGROUND

On July 21, 2004, the Commission issued an Order ("Order") fining PE Services $10,000 each for four violations of the AGS Act. (Order at p. 38). The dispute is whether the disclosure was "adequate" within the meaning of Section 19-115(f) of the AGS Act.

The Commission determined that the marketing materials subject to Section 19-115(f) were a one-page document consisting of a letter and an agreement (the "Offer"). The Commission ruled that PE Services' December 11, 2003 Letter served as a clarification of the Offer and, when considered with the Offer and the testimony of PE Services' witness Wendy Ito, adequately disclosed certain provisions at issue including: 1) billing and payment options; 2) the price of gas under the Offer; 3) the automatic extension provision of the termination clause; and 4) PE Services' ability to change the price of gas under Paragraph 7 of the Offer. (See Order at p. 37). The Commission ruled that PE Services' logo and disclaimer complied with the regulations regarding affiliated interests. (Order at p. 33). However, the Commission concluded that the terms of the three provisions disclosed in the Offer -- the *force majeure* provision, the return to utility service provision, and the early termination fee provision -- did not comply with Section 19-115(f). (Order at p. 37).

While stating that it would not require disclosure of any particular fact (Order at p. 14), *i.e.*, that it would not dictate the wording that must be used in marketing materials being reviewed under the AGS Act, the Commission questioned the possible breadth and wording of three contract provisions, and, from this analysis, concluded that these provisions were not adequately disclosed. Also, while the Commission read into Section 19-115(f) a materiality element, PE Services submits that the Commission did not consistently apply this new standard to each issue, reaching a materiality determination on only one of the three provisions at issue.

In addition, the Commission's Order did not examine whether PE Services adequately disclosed the *force majeure* provision or whether it was "material." Instead,

the Order examined the legality of this provision and ruled on it without any case or controversy. These determinations constitute grounds for rehearing and indicate that Section 19-115(f) is unconstitutionally vague because it fails to provide the Commission or an Alternative Gas Supplier ("AGS") with sufficient notice or guidance as to the requirements regarding marketing.

GROUNDS FOR REHEARING

I. The Statute Is Vague And Unconstitutional As It Fails To Provide Sufficient Guidance As To What Constitutes An Adequate Disclosure.

In this case of first impression, the Commission interpreted the adequate disclosure requirement of Section 19-115(f)(1).

Section 19-115(f) provides, in relevant part:

> An alternative gas supplier shall comply with the following requirements with respect to the marketing, offering, and provision of products or services:
> (1) Any marketing materials which make statements concerning prices, terms, and conditions of service shall contain information that adequately discloses the prices, terms and conditions of the products or services.

220 ILCS § 5/19-115(f)(1). The Order articulated the following construction of the adequate disclosure requirement:

> Such a construction of Section 19-115(f), as applied to the facts at bar, would include, but not be limited to, disclosure of the information provided, in plain English, that is, understandable to the person of ordinary intelligence, and readily apparent (not hidden or buried). And, it would require accurate disclosure of material facts in marketing materials, that is, those facts, upon which, a buyer would reasonably be expected to rely, when making a decision whether to purchase the product.

(Order at p. 13) (internal citations omitted).

The statute provides no guidance as to what constitutes "adequate disclosure," and this deficiency raises due process concerns. The Commission's construction, including the inclusion of a materiality clause, cannot cure this deficiency because it

lacks the statutory authority to cure the deficiency. The authority and power of the Commission is guided by the Illinois Public Utilities Act, 220 ILCS § 5/1-101 *et seq.* (the "Act"). "The Commission, because it is a creature of the legislature, derives its power and authority solely from the statute creating it, and its acts or orders which are beyond the purview of the statute are void." Chicago v. Illinois Commerce Com., 79 Ill. 2d 213, 217-218 (1980) (citing People ex rel. Illinois Highway Transportation Co. v. Biggs, 402 Ill. 401, 409 (1949)).

Accordingly, for purposes of the due process analysis, the statute, as written by the Illinois General Assembly, must be the focus of the analysis. "The cardinal rule of interpreting statutes, to which all other canons and rules are subordinate, is to ascertain and give effect to the intent of the legislature." In re Estate of Dierkes, 191 Ill.2d 326, 331 (2000). In determining legislative intent, a court first must consider the statutory language itself. McNamee v. Federated Equip. & Supply Co., Inc., 181 Ill.2d 415, 423 (1998); Bonaguro v. County Officers Electoral Board, 158 Ill.2d 391, 397 (1994). A court may not depart from the plain language and meaning of a statute by reading in conditions which conflict with the intent of the legislature. Inphoto Surveillance, Inc. v. Crowe, Chizek and Company, LLP, 338 Ill. App. 3d 929, 933 (1st Dist. 2003).

The adequate disclosure standard in Section 19-115(f)(1) is constitutionally deficient. "Statutes regulating commercial speech are subject to attack on the grounds that they are unconstitutional on their face, not simply as applied, where the constitutional challenge is based on vagueness." Vuagniaux v. Dep't of Prof'l Regulation, 208 Ill. 2d 173, 192 (Ill., 2003) (citing Jacobs v. Florida Bar, 50 F.3d 901, 907 (11th Cir. 1995)). A statute is void for vagueness under the due process clause if

the terms are so vague that people of ordinary intelligence must guess at the meaning of the statute and differ as to its application. International Soc. for Krishna Consciousness v. Rockford, 585 F.2d 263, 270 (7th Cir. 1989). A statute should be held unconstitutionally vague where its terms are so poorly defined that a trier of fact will determine their meaning based on her own opinion or whim rather than objective standards or criteria. Rackow v. Human Rights Comm., 152 Ill. App. 3d 1046, 1057 (2d Dist. 1987).

A vague statute presents two potential problems. First, vague statutes do not provide sufficient warning for an individual to determine what conduct is prohibited. Flipside, 455 US at 498 (quoting Grayned v. Rockford, 408 U.S. 104, 108-09 (1972)). Second, vague laws that lack objective standards present the possibility of discriminatory enforcement. Id. Where a statute is impermissibly vague, application of the statute is a violation of the right to due process. Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489 (1982). Application of Section 19-115(f) using subjective criteria implicates both concerns and constitutes a violation of PE Services' due process right.

The Commission Order noted that Section 19-115 is a remedial statute whose language should be interpreted broadly and that a broadly worded statute should not be confused with subjective application. (Order at 13) (citing Klebe v. Patel, 247 Ill. App. 3d 474, 479 (2d Dist. 1993)). Even if the statute should be viewed broadly as a remedial statute, it is clear that Section 19-115(f) fails to provide basic objective criteria necessary to provide the Commission or alternative gas supplier ("AGS") with guidance as to requirements of adequate disclosure. The Commission's Order itself

demonstrates that Section 19-115(f) is vague and lacks sufficient guidance. First, the Commission incorporated a materiality requirement as part of its analysis. See infra Part II. Second, the Commission undertook an analysis of the legality of the *force majeure* provision as a proxy for assessing whether it was adequately disclosed. See infra Part II(B)(3)(a). In addition, Section 19-115(f) does not even clearly define the scope of what constitutes marketing materials. Staff, for example, argued that only one side of PE Services' one-page Offer should be considered in evaluating the disclosures. (Order at p. 15). It is clear from these examples that Section 19-115(f) failed to provide the Commission with an objective standard and guidance necessary to consistently enforce the marketing requirements. As such, the statute is impermissibly vague.

The absence of even a basic objective standard renders the case-by-case evaluation suggested by the citation to Scott v. Association for Childbirth at Home, 88 Ill. 2d 279, 288-91 (1981) impractical. (Order at p. 13). AGS commit significant time and resources to developing and marketing service offers. As indicated above, the Order demonstrates that Section 19-115(f) fails to provide a workable, objective standard. A case-by-case evaluation does not provide AGS with the certainty of an objective standard or the guidance necessary to develop marketing that complies with Section 19-115(f). Application of the imprecise language on a case-by-case basis will subject AGS to the unfettered discretion and whim of the Commission so that this approach must be rejected. Moreover, in this case of first impression, PE Services lacked even the guidance of the Commission's interpretation to guide its marketing.

Without an objective definition of the term "adequate," there is no intelligible standard to guide compliance and enforcement. Therefore, Section 19-115(f) is

impermissibly vague and application of Section 19-115(f) is a violation of PE Services' right to due process.

II. The Commission Order Failed to Accurately Or Consistently Apply The Standard Articulated by Section 19-115(f).

This is the first time the Commission has interpreted the "adequate disclosure" requirement of Section 19-115(f) of the AGS Act. At the time PE Services issued the Offer, the Commission had not promulgated any regulations or otherwise provided any guidance as to what it would consider an adequate disclosure. Nevertheless, the Commission imposed the maximum $10,000 fine on PE Services for each of three contract provisions for which it concluded that disclosure was inadequate. The Commission's decision unfairly singles out PE Services among the AGS and imposes a fine that is disproportionate to any alleged inadequacy as this is the first application of Section 19-115(f) and neither CUB nor Staff produced any evidence of harm in this case.

A. After adding a materiality standard to Section 19-115(f), the Commission did not consistently apply a materiality analysis to the issues.

Under the Commission's Order, Section 19-115(f) requires a two part consideration: (1) was the provision a material term of the Offer, and (2) if the provision was a material term of the Offer, was that material term adequately disclosed?

The Commission reached a materiality determination on only one of the three provisions at issue. The Commission concluded that the early termination fees provision was a material term of the contract. The Order made no materiality finding on either the *force majeure* provision or the return to utility service provision. (Order at p. 30).

Under the standard developed by the Commission, only material terms must be adequately disclosed. Therefore, the trier of fact must first determine whether a term at issue was material. Because the "materiality" standard was created in the Order, *i.e.*, after the hearing, the parties did not address the issue at the hearing and no proof was offered on this question. The Commission failed to make a determination that either the *force majeure* provision or the return to utility service provision was a material term of the Offer. There was no evidence in the record to support a finding of materiality for the early termination fees provision. As such, it is not clear from the record that these three provisions were "facts upon which a buyer would reasonably be expected to rely" when deciding whether to accept service under the Offer. (Order at p. 13). Accordingly, the Commission improperly applied its adequate disclosure standard when it assessed these three provisions.

B. Each of the three provisions at issue was adequately disclosed in the marketing materials.

Section 19-115(f) requires an AGS that disseminates marketing materials to adequately disclose the price, terms, and conditions of service. Blacks Law Dictionary defines the word "adequate" as "legally sufficient". BLACKS LAW DICTIONARY 40 (7th ed. 1999). Webster's Dictionary defines the term "adequate" as "as much or as good as necessary for some requirement or purpose; fully sufficient, suitable, or fit." WEBSTER'S UNABRIDGED DICTIONARY 24 (2d ed. 1997).

The Commission's decision did not address whether the terms of the Offer were disclosed in a manner "as good as necessary for some requirement or purpose." Instead, the Commission examined the appropriateness of the terms themselves and

whether it approved of the possible effects of those terms. There is no dispute that each of these provisions was disclosed. The only issue is one of "adequacy."

The Commission determined that the adequate disclosure requirement of Section 19-115(f) requires the disclosure of "information provided, in plain English, that is, understandable to the person of ordinary intelligence, and readily apparent (not hidden or buried)." (Order at 13). The Commission further determined that the marketing material at issue consists of both the front and back pages of the solicitation, including the letter and agreement which together constituted the Offer. (Order at 16). Additionally, the Commission concluded that its role under Section 19-115(f) is not to require an AGS "to disclose any particular fact" in its marketing materials. (Order at p. 14). Using these criteria, the early termination fee, return to utility services, and *force majeure* provisions were adequately disclosed. Each provision was disclosed and was printed in a legible size and font, and there were no footnotes or fine print regarding the terms of the Offer. Moreover, the descriptive headings for each paragraph were printed in bold to indicate the topics contained in that paragraph.

1. PE Services adequately disclosed the early termination fees in accordance with Section 19-115(f).

The early termination charges associated with the Offer are specifically described in paragraph 7 which is entitled "**Term, Termination & Termination Charges.**" (Offer at ¶ 7). The existence of a termination fee is not hidden or buried as the title of paragraph 7 clearly notifies consumers of the existence of a termination charge. Moreover, the language of paragraph 7 clearly indicates the methodology for calculating the termination fee. Where a customer terminates the agreement prior to the end of the term, PE Services would assess a termination fee of $0.15 per therm that would have

been used during the remainder of the agreement. PE Services would make a good faith estimate to calculate the number of therms that would have been consumed during the remainder of the term of the agreement. (Offer at ¶ 7).

The Commission found that the use of the phrase "good faith estimate" failed to provide an adequate description of the calculation. (Order at p. 30). In fact, the Offer included a clear statement that a termination fee exists and the basic method for its calculation. The concept of estimating gas usage should not be foreign to the Commission as there are well-established methods, such as a heating degree day analysis, to estimate gas usage. While the Commission stated that the termination charge was not adequately disclosed, it is actually faulting PE Services for not disclosing the specific facts of its estimating process in more detail. Contrary to the Commission's statement that it is not requiring the disclosure of specific facts, the criticism of the termination fee calculation is dictating specific disclosure. Accordingly, the termination charges were adequately disclosed in accordance with the requirements of Section 19-115(f).

2. PE Services adequately disclosed the return to utility service provision in accordance with Section 19-115(f).

The ability to return a customer to utility service is adequately disclosed in paragraph 7, a paragraph entitled "**Term, Termination & Termination Charges**." Paragraph 7 states:

> Company reserves the right not to commence service under this Agreement or to return Client to Client's prior utility service upon verbal notice, confirmed in writing, if, in Company's sole judgment, there are changes to rules, regulations, tariffs or procedures or other circumstances that adversely affect Company's ability to serve Client or provide the price.

(Offer at ¶ 7). The Commission determined that the provision was vague and that it potentially allowed PE Services to terminate the agreement. (Order at p. 28). Although the provision was in the same font as the rest of the provisions, the Commission determined that this provision was "buried" in paragraph 7. (Order at p. 28). However, the return to utility service provision is a termination provision and, therefore, logically was included in paragraph 7 regarding the termination of service. The potential breadth of the application of the provision is not an element of Section 19-115(f) or the Commission's standard for ascertaining if disclosure was adequate. Moreover, paragraph 7 was clearly labeled and the existence of the right to return a customer to utility service was adequately disclosed to consumers in accordance with Section 19-115(f).

3. PE Services adequately disclosed the *force majeure* provision in accordance with Section 19-115(f).

The *force majeure* provision was adequately disclosed in Paragraph 6 of the Offer, a paragraph entitled "**Force Majeure**" (Offer at ¶ 6). The *force majeure* provision defined the conditions under which either party may be excused from performance upon notice to the other party. The potential breadth of the application of the provision is not an element of Section 19-115(f) or the Commission's standard for ascertaining if disclosure was adequate. The existence of a *force majeure* provision, and its allegedly broad scope, were adequately disclosed to consumers considering the Offer. As such, PE Services complied with the requirements of Section 19-115(f).

a. The Commission issued an impermissible advisory opinion regarding the legality of the *force majeure* provision rather than addressing whether it was adequately disclosed under section 19-115(f).

The Commission did not assess the adequacy of the disclosure of the *force majeure* provision as required under Section 19-115(f). Instead, the Commission addressed the legality of the provision and the potential breadth of its enforcement. (Order at p. 22). The Commission issued an impermissible advisory opinion in considering the scope and legality of the *force majeure* provision and declaring it illegal without PE Services ever having invoked that provision.

"Resolving a question of law that is not presented by the facts of the case results in an advisory opinion." CGE Ford Heights, L.L.C. v. Miller, 306 Ill. App. 3d 431, 441 (1st Dist. 1999) (citing People ex rel. Partee v. Murphy, 133 Ill. 2d 402, 408 (1990). Courts should not issue a decision where the judgment would have an advisory effect. Id. (citing Berlin v. Sarah Bush Lincoln Health Center, 179 Ill. 2d 1, 8 (1996). PE Services had not declared a *force majeure*. This case did not involve a dispute about PE Services' interpretation of the *force majeure* clause. Nevertheless, without any case or controversy, or even an indication that PE Services contemplated applying the *force majeure* provision in an impermissible manner, the Commission issued an advisory opinion that the potential application of the provision in certain circumstances would be illegal. In addition, the Commission fined PE Services the maximum amount of $10,000 based upon this potential for an impermissible application.

In an effort to provide some justification for this finding of illegality, the Commission noted that this provision could potentially be interpreted to allow PE Services to declare a *force majeure* in response to foreseeable events. (Order at 22).

The Commission further noted that, although cases construing *force majeure* clauses are not uniform,

> many cases involving contract with consumers do not allow parties to declare a *force majeure* based on foreseeable events. The cases also hold that *force majeure* clauses are not meant to allow parties to circumvent their contractual obligations due to inconvenience, or, when it is no longer financially profitable to uphold a contractual obligation.

(Order at 22).

The Commission's Order raises two issues. First, if the cases regarding the application of *force majeu*re clauses are not uniform, the Commission should avoid issuing an advisory ruling by assessing the hypothetical scope and legality of the provision. Rather, because of the lack of uniformity in interpreting *force majeure* provisions, the Commission should only assess the legality of the provision when presented with an actual case or controversy with facts to guide its evaluation. If a consumer objected to the application of PE Services' *force majeure* provision, that consumer could bring a complaint challenging the breadth of the provision. It is categorically unfair to engage in a hypothetical analysis without an actual case or controversy, resulting in the maximum possible fine, under a statute that has never before been applied.

Second, it is not relevant under the facts of this case whether other cases hold that *force majeure* provisions are not meant to allow a party to avoid its contractual duties due to inconvenience. Under Section 19-115(f), the Commission must assess whether PE Services' marketing material adequately disclosed the *force majeure* provision. Section 19-115(f) does not instruct the Commission to assess the potential legality of the provision under a hypothetical application.

The Commission's analysis to demonstrate the potential breadth of PE Services' provision and the possibility that the language could allow it to be used to cancel the agreement due to a foreseeable event is not within the purview of Section 19-115(f). The *force majeure* provision was adequately disclosed in the Offer so that PE Services complied with the requirements of Section 19-115(f).

b. The Commission should reconsider its finding as to the *force majeure* provision as it is inconsistent with the Order.

Moreover, the Commission's decision regarding the *force majeure* provision is internally inconsistent. The Order states that the Commission is not "requiring PESCO to disclose any particular fact." (Order at p. 14). However, the Commission struck down the *force majeure* clause because it could potentially be enforced in a manner the Commission determined would be inconsistent with the principals of contract law. (Order at 22). This determination necessarily implied that PE Services should incorporate certain, undefined, limiting language for the *force majeure* provision to ensure that it would only be enforced for unforeseeable events and never for an increase in natural gas prices or interest rates. Neither Section 19-115(f) nor the Commission's interpretation of that standard provides that any specific information must be disclosed in marketing materials.

CONCLUSION

Wherefore, Peoples Energy Services Corporation respectfully requests that the Commission grant this Petition for Rehearing for the purpose of determining: (1) whether Section 19-115(f) lacks an objective standard so that it is impermissibly vague and unconstitutional; (2) whether Section 19-115(f) was consistently and accurately applied to PE Services' marketing materials in each of the three instances described above; and (3) whether the Commission issued an impermissible advisory opinion as to the legality of the *force majeure* provision that had not been enforced.

Dated: August 20, 2004

Respectfully submitted,

PEOPLES ENERGY SERVICES CORPORATION

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NOTICE OF FILING AND CERTIFICATE OF SERVICE

To: Service List

PLEASE TAKE NOTICE that on this 20th day of August, 2004, I have filed with the Chief Clerk of the Illinois Commerce Commission, the Petition for Rehearing of Peoples Energy Services Corporation, a copy of which is hereby served upon you by electronic mail and United States Mail on August 20, 2004.

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